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No. 91-1440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SCHNABEL FOUNDATION COMPANY,
Petitioner,

v.

HARBOR INSURANCE COMPANY,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE DISTRICT OF COLUMBIA CHAPTER OF THE FEDERAL BAR ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Your amicus respectfully requests leave to file the attached brief on behalf of the District of Columbia Chapter of the Federal Bar Association in support of the Petition for Certiorari of Schnabel Foundation Company. Petitioner has consented to the filing of this brief. A copy of Petitioner's letter of consent has been filed with the Clerk of this Court. Respondent has declined to consent to the filing of this brief.

The District of Columbia Chapter of the Federal Bar Association (DCFBA) has more than 2,500 members who practice in many other Circuits throughout the country. Dedicated to representing federal attorneys, DCFBA members include members of Congress, agency counsels and general counsels, sole practitioners, consumer activists, corporate attorneys

and associates and partners of law firms, large and small.

Concerned with issues of general significance involving federal practice, DCFBA seeks to keep its members informed of, and to provide meaningful input on, matters touching upon these issues. Your amicus is gravely concerned about the impact of the decision of the United States Court of Appeals for the District of Columbia Circuit in this case upon its members.

Your amicus is familiar with the questions involved and the scope of their presentation and believes there is a necessity for additional argument as to whether the United States Court of Appeals for the District of Columbia Circuit abrogated Rule 50 (b) in applying an impermissible standard of appellate review thereby nullifying a jury verdict. The attached brief sets forth additional authorities which are presented in order to assist this Court in reviewing the issues presented in the Petition for Certiorari.

Because of the important issues of federal procedural and constitutional law presented in this case, your amicus respectfully requests this Court to grant the Motion for Leave to File the attached Brief *Amicus Curiae*.

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PRELIMINARY STATEMENT

The District of Columbia Chapter of the Federal Bar Association submits this Brief *Amicus Curiae* in support of the Petition for Certiorari filed by the Schnabel Foundation Company.

INTERESTS OF THE AMICUS

The District Columbia Chapter of the Federal Bar Association (DCFBA) has more than 2,500 members who practice in many other Circuits throughout the country. Dedicated to representing federal attorneys, DCFBA members include members of Congress, agency counsels and general counsels, sole practition-

ers, consumer activists, corporate attorneys and associates and partners of law firms, large and small.

Concerned with issues of general significance involving federal practice, DCFBA seeks to keep its members informed of, and to provide meaningful input on, matters touching upon these issues. Your amicus is gravely concerned about the impact of the decision of the United States Court of Appeals for the District of Columbia Circuit in this case upon its members.

Your amicus strongly believes that the Court of Appeals for the District of Columbia Circuit has applied an erroneous standard of appellate review in contravention of Fed. R. Civ. P. 50(b) and the Seventh Amendment to the U.S. Constitution and has decided the case in a manner contrary to decisions of seven other circuits. As a consequence, the ruling of the Court below has created great uncertainty which will directly impact DCFBA members in their civil trial practice in the Federal Courts of the United States.

The issues presented by the Petition for Certiorari will be of importance to the Department of Justice and U.S. Attorneys throughout the country as they take an increased role in jury cases as required by the Civil Rights Act of 1991. The confusion engendered by the split in the circuits should be resolved by this Court as the Government embarks upon this new aspect of Title VII jury practice.

Your amicus appreciates the opportunity to present these views, and we urge this Court to grant the Petition for Certiorari.

SUMMARY OF ARGUMENT

The decision of the District of Columbia Circuit is in direct conflict with the decisions of seven other circuits and will cause confusion and uncertainty among federal courts and federal practitioners throughout the country.

The Court below misinterpreted the 1991 Amendments to Fed. R. Civ. P. 50(b) in failing to recognize the necessity for renewing the "Motion for Judgment as a Matter of Law" following the rendition of the verdict by the jury.

The result reached by the Court below will allow litigants to engage in *vertical forum shopping*, because it permits a litigant to elect to bypass the trial judge and, instead, litigate the issue of the sufficiency of the evidence before the appellate tribunal.

I. THE COURT OF APPEALS HAS MISINTERPRETED THE 1991 AMENDMENTS TO FED. R. CIV. P. 50(b) IN A MANNER IN CONFLICT WITH SEVEN OTHER CIRCUITS.[1]

In overturning the D.C. Circuit's prior ruling in *Jones* v. *Reliance Insurance Co.*, 607 F.2d 1 (D.C.

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[1] *Karajala v. Johns-Manville Prods. Corp.*, 523 F.2d 155, 157 (8th Cir. 1975); *Woods v. National Life and Accident Ins. Co.*, 347 F.2d 760, 769 (3d Cir. 1965); *Wells Real Estate v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 810 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988); *Borger v. Yamaha Intern. Corp.*, 625 F.2d 390, 395 (2d Cir. 1980); *Hilord Chemical Corp. v. Ricoh Electronics, Inc.*, 875 F.2d 32, 38 (2d Cir. 1989); *Charles Jacquin Et Cie v. Destileria Serralles*, 921 F.2d 467, 475 (3d Cir. 1990); *Dixon v. Montgomery Ward*, 783 F.2d 55 (6th Cir. 1986); *Continental Cas. Co. v. Howard*, 775 F.2d 876, 883 (7th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986); *Edwards v. Jewish Hosp. of*

Cir. 1979) (per curiam), the court below stated the following:

> The *Jones* rule creates a *de facto* disparity between our standard of review for directed verdict motions and j.n.o.v. motions, a disparity that seems especially unjustified in light of the recent change in the Federal Rules eliminating the difference in terminology between the two.

Harbor Insurance Co. v. *Schnabel Foundation Company*, 946 F.2d 930, 936 (D.C. Cir., 1991) (Petition for Certiorari, Appendix at 43a). This analysis by the court below is erroneous.

The Notes of the Advisory Committee on Rules, 1991 Amendments to Rules 50(a) and (b) state, in pertinent part:

> **50(a):**
>
> The term "judgment as a matter of law" is an almost equally familiar term and appears in the test of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to pre-verdict and post-verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding.
>
> * * * *
>
> The revision authorizes the court to perform

St. Louis, 855 F.2d 1345 (8th Cir. 1988); *Quaker City Gear Works, Inc. v. Skil Corp.*, 747 F.2d 1446 (Fed. Cir. 1984), cert. denied, 471 U.S. 1136 (1985).

its duty to enter judgment as a matter of law at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party's case.

* * * *

Paragraph (a)(2) retains the requirement that a motion for judgment be made prior to the close of the trial, subject to renewal after a jury verdict has been rendered. The purpose of this requirement is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment.

50(b):

Subdivision (b). This provision retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence. One purpose of this concept was to avoid any question arising under the Seventh Amendment. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940). It remains useful as a means of defining the appropriate issue posed by the post-verdict motion. A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion. *e.g., Kutner Buick, Inc. v. American Motors Corp.*, 848 F.2d 614 (3d Cir. 1989).

Often it appears to the court or to the moving party that a motion for judgment as a matter of law made at the close of the

> evidence should be reserved for a post-verdict decision. This is so because a jury verdict for the moving party moots the issue and because a pre-verdict ruling gambles that a reversal may result in a new trial that might have been avoided. For these reasons, the court may often wisely decline to rule on a motion for judgment as a matter of law made at the close of the evidence, and it is not inappropriate for the moving party to suggest such a postponement of the ruling until after the verdict has been rendered.
>
> In ruling on such a motion, the court should disregard any jury determination for which there is no legally sufficient evidentiary basis enabling a reasonable jury to make it. The court may then decide such issues as a matter of law and enter judgment if all other material issues have been decided by the jury on the basis of legally sufficient evidence, or by the court as a matter of law.

The 1991 Amendments to Rule 50 emphasize the comprehensive scheme whereby a party may obtain "judgment as a matter of law." The rules afford three distinct, yet interdependent opportunities to be awarded judgment as a matter of law by the court:

(1) prior to trial pursuant to Rule 56; (2) during trial pursuant to Rule 50(a); (3) following trial pursuant to Rule 50(b).

The interaction of these three rules creates a continuum available to all litigants which is designed to facilitate the just, speedy and inexpensive determination of every action where one party is unable to

carry the factual burden of proof essential to that party's case.

In *Celotex Corp.* v. *Catarett*, 477 U.S. 317, 327 (1986), this Court stated:

> "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole which are designed to secure the just, speedy and inexpensive determination of every action."

As the notes to the 1991 Amendments to Rule 50 point out, section (a) of that rule provides the second opportunity to obtain judgment as a matter of law prior to submission of the case to the jury at any time when it becomes "apparent that either party is unable to carry a burden of proof which is essential to that party's case."

The notes to subdivision (b) make it clear that the post-trial motion authorized by the rule is "a *renewal* of the original motion made at the close of the evidence." The notes further make it clear that a ruling on a motion made at the close of the evidence"should be reserved for a post verdict decision" and that the court, *or the moving party*, should suggest "a postponement of the ruling until *after* the verdict has been rendered" (emphasis added). Thus, the Advisory Committee notes strongly suggest that a post-verdict motion must be made in all cases so that the court may determine if there is "legally sufficient evidence" to support the verdict after it is entered.

The notes to the 1991 amendments clearly demonstrate the distinct roles which the pre-verdict motion and the post-verdict "renewal" thereof play in

this comprehensive scheme. A party who fails to renew his Motion for Judgment as a Matter of Law after trial denies the trial court the opportunity to determine the "sufficiency of the evidence."

In the absence of the trial court's ruling on legal sufficiency, the appellate court is left without the trial court's findings on that issue and it should not substitute its views for that of the jury.

As this Court pointed out in *Montgomery Ward & Co. v Duncan*:

> A decision in favor of the moving party upon the motion for judgment ends the litigation and often makes it possible for an appellate court to dispose of the case without remanding it for new trial.

311 U.S. at 243, 251 (1940)

It is also clear that Rule 50(b) is designed to give the non-moving party the opportunity to oppose the motion before the trial court which has the entire record before it, and which has observed the demeanor of the witnesses and is in a position to determine their credibility in ruling on the "sufficiency of the evidence.

The Petitioner was denied this opportunity in the instant case, and instead, was required to relitigate the sufficiency of the evidence before an appellate tribunal which reviewed only a portion of the record.

Finally, the Respondent gained a substantial advantage in by-passing the trial court and, instead, arguing sufficiency of the evidence before the Circuit Court. This type of *vertical forum shopping* should not be sanctioned by this Court. It was clearly not

the intention of the 1991 revisions to Rule 50 to permit such a practice. On the contrary, the rule strongly indicates that Rule 50(b) is the *preferred* procedure for obtaining judgment as a matter of law.

If the opinion below is allowed to stand, litigants will routinely elect *not* to move for judgment under Rule 50(b) when they believe they stand a better chance of prevailing before the appellate court. Such a practice will substantially increase the burden of the federal appellate courts and is not sanctioned by the 1991 amendments.

CONCLUSION

For the foregoing reasons, your amicus respectfully urges this Court to grant the petition for Certiorari and ultimately, to reverse the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A

Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings [Effective on Dec. 1, 1991. See, also, rule above.]

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, crossclaim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law.

If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.